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No. 79-102

# In the Supreme Court of the United States

OCTOBER TERM, 1978

MARION A. SAJDAK, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on April 10, 1979. A petition for rehearing was denied on June 21, 1979 (Pet. App. 2a-3a). A petition for a writ of certiorari was filed on July 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the district judge properly refused to recuse himself from presiding at petitioner's probation revocation hearing.

## STATEMENT

Following a hearing in the United States District Court for the Northern District of Illinois, petitioner was found guilty of repeatedly violating the terms of his probation. The district court revoked petitioner's probation and sentenced him to four concurrent terms of three and a half years' imprisonment. The court of appeals summarily affirmed (Pet. App. 1a-2a).

1. Previously, in September 1975, petitioner had pleaded guilty in the same district court to four counts of mail fraud, in violation of 18 U.S.C. 1341. On October 28, 1975, the district court sentenced petitioner to four concurrent terms of five years' imprisonment. Thereafter, the district court suspended sentence and placed petitioner on five years' probation, the first six months of which were to be served at a community treatment facility. After a hearing concerning petitioner's probationary conduct in August 1976, the district court imposed several conditions on petitioner's continued probation, including a requirement that petitioner turn over all his checkbooks and money orders to his probation officer.[1] And on June 10, 1977, following still another hearing on petitioner's failure to adhere to the terms of his probation, the district court ordered petitioner to obtain permission before opening a checking account and to make restitution with regard to specific "bad" checks that he had issued (Pet. App. 8a).

Nevertheless, petitioner subsequently opened checking accounts in several Illinois banks without the permission of his probation officer. Petitioner then closed those accounts and issued a total of eight checks to three

[1]The district court also ordered petitioner to continue psychiatric treatment, to cease using credit cards, to obtain approved employment, and to make periodic reports to his probation officer.



different payees. The checks, which were drawn on various closed accounts including those opened after June 10, 1977, were returned to the payees marked "account closed." The district court concluded that petitioner had thus violated his probation by not turning over his checkbooks to his probation officer, by opening new accounts without requesting permission from his probation officer, and by passing bad checks in violation of state law (Pet. App. 6a-9a; Tr. 24, 37-38, 44-45, 47-49).

2. At the beginning of the hearing on the probation revocation, petitioner filed a motion for recusal of the district judge. The appended affidavit in support of this motion asserted that the United States Attorney's office had informed the district judge that petitioner claimed that his probation had not been revoked in June 1977 because he had arranged to pay a bribe to the district judge. The affidavit further stated that the government's investigation of this claim had verified that petitioner had transferred a large sum of money to a third party but that none of this money ever reached the district court (Pet. App. 3a-5a).

The district judge acknowledged that the United States Attorney and petitioner's counsel had informed him of the alleged bribe attempt (Pet. 7-8; Tr. 4-5). The court refused to recuse itself, however, observing that petitioner, if he wished, could explain the situation during the hearing, but that

> I certainly, under the circumstances of this case, where an allegation has been made that I have been bribed once in this case, I certainly am not going to recuse myself from acting and going through with this matter on the basis that someone makes a baseless allegation against me that impugns my

> integrity and, by doing that, expects me to recuse myself from further consideration of the case. Now, the evidence is here and I am prepared to go ahead.

(Pet. 8; Tr. 5-6).

**ARGUMENT**

Although petitioner does not contest the district court's conclusions regarding his violations of the terms of his probation, he raises several claims (Pet. 7-18) regarding the district judge's refusal to recuse himself. These contentions are without merit.

*a.* Petitioner first argues (Pet. 7-9) that the district court improperly evaluated the accuracy rather than the sufficiency of the averments contained in the affidavit supporting the recusal motion. To be sure, a district judge may not pass upon the truth of the allegations made in an affidavit of personal bias or prejudice. See, *e.g.*, *Bell* v. *Chandler*, 569 F. 2d 556, 559 (10th Cir. 1978); *United States* v. *Sciuto*, 531 F. 2d 842, 845 (7th Cir. 1976). But 28 U.S.C. 144, upon with petitioner relies, requires that the district judge consider the legal sufficiency of the affidavit before recusing himself. See, *e.g.*, *Bell* v. *Chandler*, *supra*; *United States* v. *Archbold-Newball*, 554 F. 2d 665, 682 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Bray*, 546 F. 2d 851, 857 (10th Cir. 1976). And here, petitioner's vague allegations concerning an alleged bribe attempt did not adequately establish the district court's personal prejudice against petitioner. See, *e.g.*, *United States* v. *Wolfson*, 558 F. 2d 59, 62 (2d Cir. 1977); *United States* v. *Bray*, *supra*, 546 F. 2d at 857. As the court of appeals correctly observed (Pet. App. 1a-2a):

> The mere filing of an affidavit of disqualification does not automatically require a judge to disqualify himself. [Petitioner's] allegation that the judge would be prejudiced upon learning of the attempted bribery



> is only a suggested inference. The fact of bias or prejudice must be identified specifically by time, place, occasion, and circumstances of the occurrence of such attitude. There is no evidence in the record that the trial judge abused his discretion.

*b.* In this Court, petitioner contends for the first time (Pet. 9-18) that the district court's declination to recuse itself ran afoul of the "objective standard" of judicial impartiality set forth in 28 U.S.C. 455. Review of that fact bound question by this Court is unwarranted, especially in light of petitioner's failure to direct the court of appeals' attention to Section 455.

In any event, although the district judge might well have recused himself given his feelings that his reputation had been impugned (Tr. 6), the court of appeals did not err in affirming the district court's exercise of discretion on this point. Section 455 directs a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The inference of partiality or personal bias that may reasonably be drawn from an allegation that petitioner was willing to bribe the district court but that the court never received any money is extremely weak.[2] Moreover, contrary to petitioner's suggestions (Pet. 13-14), nothing in the record indicates

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[2]The fact that petitioner confessed to attempting such a crime is a matter that any district court could properly take into account in sentencing petitioner. See *United States* v. *Grayson*, 438 U.S. 41, 49-51 (1978). We further note that a motion to revoke petitioner's bond has recently been filed in the Northern District of Illinois because petitioner has allegedly passed still other bad checks while vacationing in the Virgin Islands.

that the judge was prejudiced against petitioner or treated him unfairly.[3] The district court did ask questions of various witnesses and also called on petitioner to testify, but all of the court's inquiries were directed to the overwhelming evidence of petitioner's violation of the terms of his probation and not to petitioner's attempted bribe.[4]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

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[3]Petitioner misleadingly suggests (Pet. 17) that the United States Attorney believed that recusal was warranted. The government, however, expressly left that decision to the "best judgment" of the court (Pet. 17; Tr. 9).

[4]There is also no merit to petitioner's additional contention (also raised for the first time here) that he was denied due process of law (Pet. 18). Petitioner has not demonstrated either bias on the part of the district court or actual prejudice to him.

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